JUL 18 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 356

WILLIE KIRK and TED PERRY, *Petitioners,*
(Consolidated Cases)

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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(Consolidated Cases)

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioners, Willie Kirk and Ted Perry pray that a writ of certiorari issue to review the order, and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on June 20, 1969.

Opinions Below

The order of the United States Court of Appeals for the Sixth Circuit appears at Appendix, infra, p. 21, and is unreported.

The verdict of the jury, the judgment entered by the United States District Court for the Eastern District of Kentucky, Pikeville Division, appears at Appendix B, infra, pp. 13-15.

Jurisdiction

The order or judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 20, 1969. See Appendix B, infra, p. 21.

The jurisdiction is invoked under 28 USC Sec. 1254(1).

Questions Presented

Whether or not the proceedings in the District Court were a denial of the defendants of due process and equal protection of the law, to-wit:

1. The petitioners contend that counts 2, 3 and 4 of the indictments were faulty in that they failed to charge a crime.

2. Petitioners further contend that there was a burden upon the Government to show cause why the jury impaneled in the regular manner should be dismissed, and a special "Blue Ribbon" jury should have been summoned to try the defendants, and only the defendants.

3. The petitioners contend that the fact, as the jury was finally impaneled and charged, there was no one on the panel from Martin County, (the County of the alleged offense) or from an adjoining county was a defacto denial of due process and equal protection of the law to the defendants.

Statutes Involved

The statutory provisions involved are 18 USC Sec. 1001, 28 USC Sec. 1961 and 28 USC Sec. 1865.

Constitutional Provisions Involved

Constitution of the United States, Amendment V:

> ". . . nor be deprived of life, liberty, or property, without due process of law. . ."

Statement

This case originated in the Federal Court, Eastern District of Kentucky, Pikeville, Kentucky, when a Federal Grand Jury returned an indictment against Willie Kirk, Ted Perry and others, charging (1) a conspiracy to defraud

an agency of the United States, to-wit, the Flood Disaster Relief Program in Martin County, Kentucky, (2) use of a false writing and document, (3) use of a false writing and document, (4) use of a false writing and document and (5) use of and filing false writings and documents in violation of Title 18, Sec. 1001 of the United States Code. [Appendix B, p. 21]

Prior to an amendment of March 27, 1968, Section 1865, 28 USC provided as follows:

> "Grand juries and petit juries shall from time to time be selected from such parts of the district as the Court directs so as to be most favorable to an impartial jury, and not to incurr unnecessary expenses or unduly burden the citizens of any part of the district with jury service. To this end, the Court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district, and may appoint a jury commissioner for each such place."

Pursuant to Title 28 USC Sec. 1865, a jury box for the Eastern Division of the Eastern District of Kentucky was maintained, and jurors for other trials of other persons accused of the same or similar crimes were drawn from names placed in such a box.

At a prior term of court, a jury selected from the box acquitted a county judge of another county of the division. It appears that a jury panel had been selected from the box for the term of court at which the defendants here were to be tried. [Order of 19 day of February, 1968, Docket #24] The Government then moved that for the trial of the defendants, the regular jury be dismissed, and a special jury panel be subpoened. [30 Jan 68, Docket #21]

The defendants resisted this motion, but an order was subsequently entered excusing the regularly impaneled jury

and directing that a panel be subpoened from the entire Eastern District. [2-28-68, Docket #22,24]

Title 28, USC 1861, was amended on March 27, 1968, to read as follows:

> "It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes . . ."

The defendants were on trial the next day under a jury selected from the entire Eastern Judicial District. There were no more than three or four jurors from the four counties that touch Martin County, and none from Martin County, the situs of the alleged crime. As there are only seven counties in the Pikeville Division, it can be seen that the Pikeville Division was not well represented.

Argument

The jury returned a verdict against Willie Kirk of guilty on all five counts with which he was charged, and against Ted Perry of guilty on all three of the counts with which he was charged.

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the lower court entered pursuant to said verdicts, summarily, and without opinion.

Reasons For Granting Writ

I

The Lower Court has Decided a Matter of Great Public Importance in Conflict With a Similar Decision of This Court.

[*Russell* v. *U.S.*, 82 S. Ct. 1038; 369 U.S. 749; 8 L. Ed. 240]

Count No. 2 of the indictment reads as follows:

"That on or about the 11th day of January, 1964, at Inez, Martin County, in the Eastern District of Kentucky, Willie Kirk and Paul Runyans, in a material matter, within the jurisdiction of . . . an agency of the United States . . . did wilfully and knowingly use a false writing and document containing false, fictitious and fraudulent statements, knowing same to contain such statements in that in a claim in the name of Paul Runyans for 198 hrs. labor at $1.50 per hr. and 198 hrs. rental of a truck at $3.50 per hr., allegedly furnished to Martin County Well Pumping Program between March 14, 1963 and April 5, 1963, in the aggregate amount of $990.00, filed in the Office of the County Judge of Martin County, said Willie Kirk and Paul Runyans well knowing the said Paul Runyans had worked only approximately 140 hrs. and had furnished no truck."

Counts 3 and 4 are almost verbatim except for the persons charged.

The indictments in this case lack a verb, and hence are defective for want of a moving part. The want of a verb in a sentence has been compared to the lack of a mainspring in a watch—without it there is no movement. Without a verb, a sentence is just a jumble of words which say nothing, and conveys no idea. It is only with a verb that you get movement of ideas. So without a verb, counts 2, 3 and 4 convey no idea and are defective.

It has been suggested that "used" is a verb, and that the argument that the count lacks a verb is, therefore, fallacious. To be technically correct the statement should have been that it lacks "another verb." The fact that it needs "another verb" is the gravamen of *Russell* v. *U.S.*, 82 S. Ct. 1038; 369 U.S. 749; 8 L. Ed. 2d 240.

Russell v. *U.S.*, *supra*, was a case where several defendants had been found guilty of failing to answer questions before a congressional committee. It was there said that where guilt depends upon a specific identification of facts, an indictment must do more than simply repeat the language of the statute, that an indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusations against him is defective although it may follow the language of the statute, unless those words of themselves fully direct and express without uncertainty or ambiguity all the elements necessary to constitute the offense intended to be punished. The Court further held that "it is a settled rule that a bill of particulars cannot save an invalid indictment." [*Russell* v. *U.S.*, 82 S. Ct. 1038, 369 U.S. 149, 8 L. Ed. 2d 240 (at 254 L. Ed.]

Since an indictment cannot be aided extrinsically, the indictment in this instance is defective for want of an averment of "illegal use." The defendants could have used the writing for an innocent purpose, as did the flood relief people in Frankfort, or as did all of us who have touched it in the course of this case. In other words, the allegation of the court could be true and the defendants still be innocent. The act of using the writing itself is not unlawful, but becomes such only by virtue of some special facts of its use. Evil intent being indispensably necessary to warrant a conviction must be alleged in the indictment. [*Russell* v. *U.S.*, 82 S. Ct. 1038, 369 U.S. 749, 8 L. Ed. 2d 240; CJS, Indictments and Informations, § 100, 107, 132, 134, 136, 139, 152, 153 and 154.

This is of grave importance to the public at large, and to each of us that an indictment be required to be drafted so that it could not ensnare the innocent. [*Russell* v. *U.S.*, *supra*]

II

The Decision Here is in Conflict With the Public Policy as Declared by Congress in 28 USC Sec. 1861, as Amended March 27, 1968.

The defendants contend that the right to trial by a jury selected in the same manner and from the same source as jurors for trials of other persons in the same court for the same or similar charges is a basic right protected by the Fifth and Sixth Amendment to the Constitution of the United States.

In *Faye* v. *New York,* 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043, it was said that a system of selecting jurors might otherwise be constitutionally unobjectionable if applied to all classes of cases, may be brought within the prohibition of the equal protection clause of the Fourteenth Amendment if some have more favorable treatment. In that case, the Court upheld a provision for impaneling a special jury for trial of criminal cases under particular circumstances, because all defendants accused of same or similar crimes would be subjected to the same type jury selected in the same way.

In the instance case, there was singularity of treatment. All other defendants in similar actions were tried by a jury panel selected in the usual way. But not the defendants here, for them, a special "Blue Ribbon" jury.

In *Faye* v. *New York,* 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043, there was a very strong dissenting opinion by Mr. Justice Murphy which was joined in by Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Rutledge, on the grounds that constitutional standards requiring juries to be chose without systematic and intentional exclusion of any otherwise qualified group of individuals, and that defendants substantive rights were violated by the creation of a special blue ribbon jury.

The defendants contend that 28 USC § 1861, as amended March 27, 1968, did not amount to new law, but was merely a codification of the old and existing law to meet the criticism that sometimes Federal jurors are handpicked to do a particular job.

A state law conferring judicial powers on jury commissioners in selecting jurors is not for that reason in conflict with the Fourteenth Amendment to the Federal Constitution, where the accused is not subjected to any different treatment than that which prevailed in other cases. [*Murphy* v. *Louisiana*, 163 U.S. 101, 16 S. Ct. 990, 41 L. Ed. 87] The defendants here believe that no different standard ought to prevail as to Federal Law. The defendants submit that no different standard does prevail in Federal Law, and that what was done in their case constitutes reversible error.

In *Thiel* v. *South Pacific Co.*, 328 U.S. 217, 66 S. Ct. 984, 19 L. Ed. 1181, it was said that although it is not necessary that every jury contain representatives of all of the economic, social, religious, racial, political and geographical groups of the community, the jury must be selected by court officials without systematic and intentional exclusion of any group. In that case, the jury was selected systematically and intentionally excluding all persons who worked for a daily wage on the grounds that jury service by such persons imposed a financial hardship upon them and that they were usually reluctant to serve and usually excused by the judge, anyhow. The case was reversed for that reason.

In *Glasser* v. *U.S.*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680, it was said the officials charged with the duty of selecting jurors may exercise some discretion to the end that competent jurors shall be called, but they must not allow their desire to lead them into selections that do not comport with the concept of a jury as representative of a cross-section

of the community. In that case, women who were not on a special list furnished by an organization of women who had attended jury classes were systematically excluded. The Court was of the opinion that because of the source of the special instruction, such women would tend to be favorable to the prosecution.

Due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment prohibits not only arbitrary class exclusion from jury service based on race or color, but also all other exclusions which single out any individual or class of persons for different treatment not based on some reasonable classification. [*Hoyt* v. *Florida*, 368 U.S. 67, 82 S. Ct. 159, 7 L. Ed. 2d 118] That is the gist of the defendants complaint here.

Hoyt v. *Florida, supra,* involved systematic exclusion from the jury list of women unless they had voluntarily registered for such service. The Court held that this was not a violation of the Fourteenth Amendment since it was based upon the reasonable classification for the exclusion from the list was not shown to be based upon some discriminatory motive or a plan to place upon the jury women of some particular economic, community or organizational group.

In *Hoyt* v. *Florida, supra,* it was said that relevant inquiries is whether the exemption is based on some reasonable classification and whether the manner in which it is rectified rests on some rational foundation. The defendants insist that there was no reasonable basis for singling them out for a special "Blue Ribbon" jury.

This question is important not only to the defendant here, but to the public as well. If 28 USC Sec. 1861 is but a codification of existing public policy, as on its face it purports to be, and the decision here is allowed to stand, it can and probably will be cited in the future as authority

for dismissing any jury summoned from the immediate area of the situs of the court if and when the Government does not like the verdicts of a particular panel. Unless the Government is compelled to show good cause for discharging the regular panel and summonsing a special or "Blue Ribbon" jury, the potential for obtaining a jury with a propensity to convict will have been incorporated into the system of justice.

III

The Procedure Followed in Implementing the Court's Order in Impaneling a Jury from the District at Large Violated the Rights of the Defendants Guaranteed to them by the Fifth Amendment.

[*Thiel* v. *South Pacific Co.*, 328 U.S. 217, 66 S. Ct. 984, 90 L. Ed. 1181, 166 ALR 1412]

Although the order directed the summonsing of a panel from the entire Eastern District, there appears to have been systematic exclusion of persons from the Eastern Division thereof. As the jury was finally impaneled and charged, no one from Martin or an adjoining County sat in deliberation of the matter.

The petitioners accuse no one connected with the presentation of the Government's case, nor anyone in connection with the lower court of any deliberate or conscious misconduct in the selection of the jury. But overt acts are not the only kind of action about which a person can complain. Subjective intents and desires may so control our motivations that a particular end is achieved. No one could rationably label such action as misconduct. And, sometimes the only evidence of such actions are the ends achieved. Proof of such is necessarily in the form of res ipsa loquitur, or, the thing speaks for itself.

In this instance, the fact that not a single person from Martin County, the situs of the alleged crime, nor from an adjoining county, sat upon the jury, is about the only tangible evidence that others shared the feeling of counsel for the Government that the Government could not get a fair trial from a jury so composed, and that subjectively, in order to effect the wishes of the Government, an outside jury was brought in.

Almost all of us complain if we are singled out for some special treatment, or for trial by a special tribunal, or if some special step is taken in our trial that is not taken in the usual case. That is the defendants' complaint here.

Conclusion

The defendants submit these propositions:

(1) That counts 2, 3 and 4 are defective upon their face, which is apparent from a casual inspection, and that the indictments are cast in the language of the section under which the crime is charged does not save them. Some averment of criminal intent or mens rea must be contained in the indictments in order to convey a message that a crime has been committed. If mens rea is not necessary in this case, then all of us who touch or use the exhibits both in the preparation or defense of this case are in violation of the section, and hence guilty.

(2) It has always been the policy of the United States "that litigants in Federal Court entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes." [28 USC Sec. 1861, as amended March 27, 1968] There was no justification for the departure from that policy in this instance, especially when the implementation of the order departing from that policy resulted in the virtual exclusion

from the jury of persons from the division wherein the Court convened and where the alleged crime is said to have been committed.

For these reasons, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit dated June 20, 1869.

Respectfully submitted,

Joe Hobson,
Suite 2A
Richmond Plaza
Counsel for Petitioners.

APPENDIX A

[Filed March 28, 1968. Davis T. McGarvey, Clerk, U.S. District Court]

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY, PIKEVILLE

Cr. No. 2543

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

WILLIE KIRK, ET AL, *Defendants*.

ORDER

On March 28, 1968 came the Government attorney, the defendants in person, their attorneys and the jurors present as on March 27, 1968 with the exception of Alternate Juror No. 3, Bob Cantrell.

Closing arguments were made to the jury by Mr. Staker for the defendants and by Mr. Noble for the Government.

The Court instructed the jury and a recess until 1:30 P.M. was announced.

Following the noon recess came the Government attorney, the defendants in person, their attorneys and the jurors. The Court submitted the case to the jury and it retired to the jury room to consider the case. The Court discharged the alternate jurors.

Later in open court in the presence of the attorney for the United States, the defendants and their attorneys reported its verdict, to wit:

"Verdict Count 1—Conspiracy

We, the jury, being duly impanelled and sworn, find, on Count 1, as follows:

Defendant	Guilty	Not Guilty
Willie Kirk	x	
Ted Perry	x	
Paul Runyans		x

Defendant	Guilty	Not Guilty
Allen Kelly, Jr.	x	
Monroe B. Kelly		x

/s/ CHARLES K. GRACE,
Foreman.

Pikeville, Kentucky, March 28, 1968.

Verdict—Count 2

False Writing—Claim of Paul Runyans

We, the jury, being duly impanelled and sworn, find, on Count 2, as follows:

Defendant	Guilty	Not Guilty
Willie Kirk	x	
Paul Runyans		x

/s/ CHARLES K. GRACE,
Foreman.

Pikeville, Kentucky, March 28, 1968.

Verdict—Count 3

False Writing—Claim of Monroe Kelly

We, the jury, being duly impanelled and sworn, find, on Count 3, as follows:

Defendant	Guilty	Not Guilty
Willie Kirk	x	
Monroe B. Kelly		x

/s/ CHARLES K. GRACE,
Foreman.

Pikeville, Kentucky, March 28, 1968.

Verdict—Count 4

False Writing—Claim of Ted Perry

We, the jury, being duly impanelled and sworn, find, on Count 4, as follows:

Defendant	Guilty	Not Guilty
Willie Kirk	x	
Ted Perry	x	
Allen Kelly, Jr.	x	

/s/ CHARLES K. GRACE,
Foreman.

Pikeville, Kentucky, March 28, 1968.

Verdict—Count 5

False Writing—Summary of Documentation and Blanket Certification

We, the jury, being duly impanelled and sworn, find, on Count 5, as follows:

Defendant	Guilty	Not Guilty
Willie Kirk	x	
Ted Perry	x	
Paul Runyans		x
Allen Kelly, Jr.		x
Monroe B. Kelly		x

/s/ CHARLES K. GRACE,
Foreman.

Pikeville, Kentucky, March 28, 1968.

On the verdict of the jury it is ORDERED and ADJUDGED that the defendants, Monroe B. Kelly and Paul Runyans and each of them stand acquitted of the charges contained in the Indictment.

It is further ORDERED that each of the defendants, Willie Kirk and Ted Perry be admitted to bail pending appeal on giving bond. Each of them a bond in the amount of $5000.00 each, being a surety bond or property bond as may be approved by the Clerk.

TIMOTHY S. HOGAN, Judge, By Designation.

March 28, 1968.

Copies: U.S. Attorney, Zane Grey Staker, Eldred Adams.
3/29/68

[Filed March 28, 1968. Davis T. McGarvey, Clerk, U.S. District Court]

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, PIKEVILLE

No. 2543

UNITED STATES OF AMERICA,

v.

TED PERRY

On this 28th day of March, 1968 came the attorney for the government and the defendant appeared in person and by counsel, Zane Grey Staker and Eldred E. Adams, regular practicing attorneys of this court.

IT IS ADJUDGED that the defendant has been convicted upon the jury verdict of guilty to Counts 1, 4, and 5 of the offenses of Count 1, Conspiracy, 18 U.S.C. 371; Counts 4 and 5, False Writing, 18 U.S.C. 1001 as charged in the Indictment and the court having asked the defendant whether he or his attorneys have anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted. Thereupon the Probation Officer submitted a pre-sentence report to the Court.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on Count 1; on Court 5, said defendant is so committed for a period of five (5) years under 4208-a-2, said commitment to be consecutive to Count 1; on Count 4 said defendant is so committed for a period of five (5) years under 4208-a-2, said commitment to run concurrently with the sentence imposed under Count 5 and consecutively to Count 1.

IT IS ADJUDGED that —

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal

or other qualified officer and that the copy serve as the commitment of the defendant.

TIMOTHY S. HOGAN,
United States District Judge.

The Court recommends commitment to:

——, ——.

(Signed) ——, ——, *Clerk.* (By) ——, ——, *Deputy Clerk.*

Copies U.S. Marshal.

[Filed March 28, 1968. Davis T. McGarvey, Clerk, U.S. District Court]

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, PIKEVILLE

No. 2543

UNITED STATES OF AMERICA,

v.

WILLIE KIRK

On this 28th day of March, 1968 came the attorney for the government and the defendant appeared in person and by counsel, Zane Grey Staker and Eldred E. Adams, regular practicing attorneys of this Court.

IT IS ADJUDGED that the defendant has been convicted upon the jury verdict of guilty of the offenses of Conspiracy 18-USC-371, Count 1, False Writing, 18-USC-1001, Counts 2, 3, 4 and 5 and each thereof as charged in the Indictment and the court having asked the defendant whether he or his attorneys have anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted. Thereupon the Probation Officer submitted a pre-sentence report to the Court.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 5 years on Count 1; on Count 5, defendant is so committed for a period of 5 years under 18-USC-4208a,2, said commitment to be consecutive to Count 1; on each of Counts 2, 3 and 4 said defendant is so committed on each count for a period of 5 years under 18-USC-4208a, 2 each of said commitments to run concurrently with each other with Count 5 and consecutively to the sentence imposed under Count 1.

IT IS ADJUDGED that—

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or

other qualified officer and that the copy serve as the commitment of the defendant.

TIMOTHY S. HOGAN,
United States District Judge.

The Court recommends commitment to:

——, ——.

(Signed) ——, ——, (By) ——, ——,
Clerk. *Deputy Clerk.*

Copies U.S. Marshal.

APPENDIX B

[Filed June 20, 1969. Carl W. Reuss, Clerk.]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 19,140, 19,141

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

vs.

WILLIE KIRK, TED PERRY, *Defendants-Appellants*

ORDER

BEFORE: McCREE and COMBS, Circuit Judges, and McALLISTER, Senior Circuit Judge.

Appellants were convicted by a jury in the District Court of conspiring to defraud an agency of the United States of America and of knowingly and willfully using false writings in a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. § 371 (1948) and 18 U.S.C. § 1001 (1948), respectively. They contend that three of the five counts of the indictment fail to charge an offense and that certain prejudicial irregularities were committed in the selection of the jury. We find these contentions to be without merit.

We observe that the sentences of the court appear to be somewhat severe but we do not have before us the presentence investigation which may have justified it. The District Court will have an opportunity to consider reduction of the sentence if request is made under Rule 35 of the Federal Rules of Criminal Procedure.

It is therefore ORDERED that the judgment of the District Court be and it hereby is affirmed.

Entered by order of the court

CARL W. REUSS,
Clerk.

(7516-8)